

FILEDNOV 2006
U.S. MAGISTRATE JUDGE
DISTRICT OF NEVADA

BY _____ DEF

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

In the matter of the search of:)
 12720 BUCKTHORN LANE,)
 RENO, NEVADA,)
 and)
 888 MAESTRO DRIVE, RENO,)
 NEVADA, STORAGE UNITS)
 136, 140, 141, 142, and 143,)

3:06-CV-0263-LRH (VPC)
 3:06-MJ-0023-VPC

ORDER

Before the court is the motion to strike and objection to the supplemental sealed affidavit of Special Agent West filed by Dennis Montgomery, Brenda Montgomery, and the Montgomery Family Trust ("Montgomery") (#81). At the conclusion of the final August 17, 2006 evidentiary hearing in this action, the court ordered the parties to file post-hearing briefs. Thereafter, the Government submitted its supplemental brief in response to motion to unseal search warrant affidavit (#74). The Government also attached a sealed second declaration of SA Michael A. West ("SA West") in support of its position that the remaining unsealed portions of SA West's February 28, 2006 search warrant affidavit should not be unsealed (#75). Montgomery submitted an objection to the supplemental sealed affidavit of SA West in opposition to the Montgomery's motions to unseal search warrant affidavits, return of property and to seal attorney-client communications; motion to strike (#81), and the Government filed no opposition. Montgomery also submitted a post-trial brief and attached the declaration of Greg Gilbert (#80). For the reasons set forth below, Montgomery's motion to strike (#81) is granted, and this court *sua sponte* strikes the declaration of Greg Gilbert.

Over a three-month period, this court held three separate evidentiary hearings in this proceeding, and SA West testified at length during those hearings. On August 16, 2006, the day before the final evidentiary hearing, this court issued a minute order which states, in part:

1 Mr. Flynn will not be permitted to call Greg Gilbert, CPA, to testify, as
2 the court considers this proffered testimony to be cumulative. Mr. Flynn
may, however, have leave to make a brief offer of proof for the record.

3 At the beginning of the August 17, 2006 hearing, the court stated that although it would not allow Mr.
4 Gilbert to testify, it would review the Form 1099s - later correctly identified as Form K1s - and allow
5 Montgomery's counsel to make an offer of proof on the record. Tr. III, 3. The Government stipulated
6 to the admission of the K1 forms (Tr. Ex. 29), and SA West gave testimony about them. Tr. III, 7-10.
7 Montgomery made no offer of proof on the final day of the hearing.

8 At the conclusion of the last day of testimony, the court directed counsel to file post-hearing
9 briefs to address the evidence and the parties' positions concerning Montgomery's motion to unseal the
10 search warrant affidavits, to return the seized property, and, alternatively, to protect attorney-client
11 privileged materials from being reviewed. Tr. III, 209. Neither party requested or received permission
12 to provide supplemental evidence as part of the post-hearing briefing schedule. At no time thereafter did
13 the Government or Montgomery seek leave to reopen the proceeding to present new evidence.

14 A party seeking to introduce evidence after the close of the presentation of evidence must make
15 a motion to reopen the proceeding, *United States v. Ramirez*, 608 F.2d 1261, 1267 (9th Cir. 1979), and
16 if there is an insufficient showing for the reason a party failed to offer evidence at the proper time, the
17 court may refuse to grant the request. *United States v. Kelm*, 827 F.2d 1319, 1323 (9th Cir. 1987). Here,
18 the Government not only failed to make a showing as to why it failed to present the evidence in SA
19 West's second declaration; the Government never sought leave of court to do so. The Government has
20 been on notice since March 10, 2006 of Montgomery's position that the search warrant affidavit should
21 be unsealed, and it had the ensuing five months and three evidentiary hearings to develop its evidence.
22 Moreover the information provided in SA West's sealed second declaration concern facts known to SA
23 West prior to the fine August 17, 2006 hearing. The Government had a full opportunity to offer this
24 evidence prior to the conclusion of the evidentiary hearing, and it failed to do so. The court will not now
25 allow the Government to offer an *ex parte* sealed declaration post hearing in an effort to buttress its legal
26 argument.

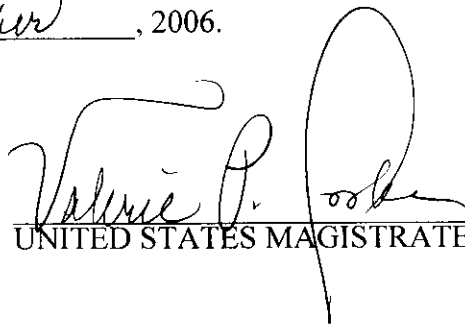
1 Apart from the Government's failure to seek leave of court to reopen this matter for the
2 introduction of new evidence, this post-hearing attempt to offer new *ex parte* evidence without giving
3 Montgomery an opportunity to question SA West concerning the facts asserted in the declaration results
4 in an obvious prejudice that this court will not sanction.

5 With respect to Mr. Gilbert's declaration, Montgomery waived his right to make an offer of proof
6 and neither sought nor received permission to reopen this proceeding after the close of evidence. The
7 Government would be similarly prejudiced by the introduction of new evidence.

8 Based on the foregoing, and good cause appearing, Montgomery's motion to strike (#81) is
9 **GRANTED** and this court orders, *sua sponte*, that the declaration of Greg Gilbert, attached to
10 Montgomery's post-hearing brief (#80) is **STRICKEN**.

11 **IT IS SO ORDERED.**

12 Dated this 28th day of November, 2006.

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16 UNITED STATES MAGISTRATE JUDGE
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United States District Court

District of Nevada

Bruce R. Thompson U.S. Courthouse and Federal Building
400 South Virginia Street, Room 404
Reno, Nevada 89501

Chambers of Valerie P. Cooke
United States Magistrate Judge

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RE: In the Matter of the search of 12720 Buckthorn Lane

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United States Magistrate Judge

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